

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**



77-7002

To be argued by
Stanley A. Walton

UNITED STATES COURT OF APPEALS

For The Second Circuit

JOHN COLEMAN,

Plaintiff-Appellant,

against

GOLKIN, BOMBACK & CO., INC., A
Corporation; and SAUL GOLKIN,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS

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Docket No. 77-7002

JOHN COLEMAN,

Plaintiff-Appellant,

-against-

GOLKIN, BOMBACK & CO., INC., A
Corporation; and SAUL GOLKIN,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT

JOHN COLEMAN

PRELIMINARY STATEMENT

This is an appeal from a decision [A253*], dated October 18, 1976, by the Honorable John M. Cannella, U.S.D.J., and from an order [A274], dated November 23, 1976, by the Honorable John M. Cannella, U.S.D.J. Said decision and order have not been reported.

* "A" denotes the Appendix, filed herewith.

STATEMENT OF ISSUES

1. Whether it was error for the District Court to deny a post-judgment motion seeking amendment of pleadings to conform to the trial evidence and judgment on the same, when no new facts or reopening of evidence was being sought.

2. Whether the facts prove common law conversion against Saul Golkin as a matter of law.

3. Whether New York law (including BCL §§717, 719, 720, and 510) compels, as a matter of law, individual liability against corporate Director Saul Golkin because of his actions with regard to Plaintiff's rights in a prior corporate obligation.

STATEMENT OF THE CASE

This is a multi-count civil lawsuit based on diversity filed originally in the Northern District of Illinois in April 1971 and later transferred to the Southern District of New York. The suit alleges various claims based on stock rights arising out of the execution of a certain July 31, 1962 stock Nominee Agreement [A1] and documents and events surrounding same.

The Honorable District Judge John M. Cannella, after trial, evidence, and submission of briefs, granted Plaintiff judgment on October 18, 1976 against the corporate Defendant (without assets) but gave judgment in favor of the individual Defendant Saul Golkin. A 21-page Opinion [A253] was filed by the District Court on October 19, 1976, and judgment was entered

thereon on October 22, 1976.

Thereafter, Plaintiff filed a joint motion regarding the Saul Golkin judgment seeking a new trial and rehearing and for leave to amend the pleadings to conform to the evidence and for judgment on same. This was briefed and denied without opinion on November 23, 1976 [A274].

The Notice of Appeal from both Orders was filed on December 23, 1976 regarding individual Defendant Saul Golkin.

STATEMENT OF THE FACTS

The facts of this case have never really been in dispute. The controversy has instead centered around differing interpretations of the facts and upon their legal significance.

The uncontested judgment against the corporate Defendants on October 22, 1976 eases even more the factual "burden" before this Court.

The facts are these:

<u>Date</u>	<u>Facts</u>
Early 1962	Coleman was an employee of the forerunner to the corporate Defendant, a brokerage business, and had a role in a certain transaction which resulted in a fee to the brokerage house taking the form of a long-term written option for 50,000 shares of Gellman Manufacturing. [Uncontradicted: A14-15, A72, A76-77, Tr.* 35-43, Ex.** 1A-2]

* "Tr." denotes the trial transcript, contained in the Record on Appeal.

** "Ex." denotes a trial exhibit, contained in the Record on Appeal.

<u>Date</u>	<u>Facts</u>
First Half 1962	Coleman and Golkin met at least once in Chicago. [Uncontradicted: Tr. 43, 119]
July or Aug. 1962	Coleman left the employment of the brokerage house. [Uncontradicted: Tr. 95]
Dec. 12, 1962	Golkin and two other persons paid \$215,000 for a large block of stock in the brokerage house and its name was changed. [Uncontradicted: Ex. 1A- 4]
Either late 1962 or early 1963	The important Coleman Nominee Agreement [A1] was actually executed--despite the date it bears of July 31, 1962--at a point in time after Golkin owned stock in the brokerage company. [Finding of fact: A256]
Dec. 12, 1962	In Schedule A of the agreement under which Golkin purchased his stock in the brokerage house [Ex. 1A- 4] it lists the Gellman option [Ex. 1A-2] at 50,000 shares "before deducting those warrants and options held for employees not presently Shareholders"; Golkin admitted at trial that he "probably glanced through Schedule A before [he] signed the agreement"; Golkin also admitted he knew about the Gellman option before his purchase into the corporate Defendant. [Uncontradicted: Ex. 1A-4, Ex. 4 (pp. 24-26), A34-35]

<u>Date</u>	<u>Facts</u>
Pre-Dec. 12, 1962	Moreover, before closing, Golkin or his "attorneys and accountants received all the financial statements" of the corporate Defendant and reviewed all its various contracts; those various agreements were also "made available to Golkin's attorneys." [Uncontradicted: A35, A36, A63]
June 10, 1963	Mr. Golkin and another person bought out the interests of other shareholders and the company name was changed for the last time. [Uncontradicted: A140-44]
Sometime during late 1964	Golkin bought out the one major remaining shareholder of the company leaving Golkin with "over 50%" of the stock and he admits to being "in control" of the corporate Defendant by this time. [Uncontradicted: A150-52]
April-May 1965	Procedures were initiated to dissolve the corporate Defendant, but for various reasons the company was "still not dissolved" as late as 1971 and no "final plan of dissolution" had been filed; a liquidation of all the then-assets which could be disposed of did take place in 1965 and Golkin's proceeds from that, more than \$250,000, were transferred by Golkin to a company named First Hanover Corporation together with miscellaneous assets (e.g., the company stock exchange seat); Golkin

<u>Date</u>	<u>Facts</u>
	was a chief executive officer of First Hanover and its Chairman of the Board; the options of the corporate Defendant, including the Gellman option, were not liquidated. [Uncontradicted: A147-48, A154, A156-68, A165-66, A172-73, Ex. 4-19 (p. 3)]
By late 1967	By this time, the optionor, Gellman Manufacturing, had changed its name to Amco Industries. [Uncontradicted: A167, Ex. 4-15]
By late 1967	Golkin came to own 88% of the stock in corporate Defendant and he was "its President" and he admits he "controlled the election of the board of directors." [Uncontradicted: A189-90, A192, Ex. 4-7]
Late 1967 (before late Dec.)	At least by now Golkin knew of the nominee interest of a certain Mr. Albert in the Amco option and Golkin honored it without even any requirement of proof by Albert that he had such an interest. [Uncontradicted: A167-68]
Late 1967	<u>Golkin admits that by this time he also had knowledge that Coleman might have an interest in the Amco option</u> (and the manner in which the knowledge was acquired is not legally important). [Uncontradicted: A195-96]
Late 1967 (before late Dec.)	Golkin personally and directly contacted various persons other than Coleman about exercising the

Date

Facts

Amco (formerly Gellman) option and their investing in it; he advised each about a "rumor" he had heard that a Mr. Schwartzberg, "a very successful businessman" who once owned Realemon juices was going to buy "an interest" in Amco; the Amco stock was trading at or about the price at which the option was eventually exercised (\$2.00). [Uncontradicted: Tr. 113-15, 126]

Late 1967
(before late
Dec.)

The Court found discreditable Golkin testimony that he allegedly asked Mr. Albert by telephone to ascertain if Coleman had an interest in the option and that Albert reported back by telephone that he had done so but that Coleman elected not to buy into the option. [A271-72, A195] [Conversations disputed both by Albert and by Coleman: Tr. 44; and the District Court rejected this Golkin testimony: A271-72]

Late 1967
(before late
Dec.)

Neither Golkin nor anyone in the corporate Defendant ever attempted to call Coleman at any time; nor did anyone at the Company ever inspect any records to determine if Coleman had an interest; nor did anyone there ever attempt to write Coleman about the subject; Golkin admitted holding the private view then that the option exercise was "unimportant" and simply "not a big deal" to him at the time. [Uncontradicted: A197-98; Tr. 121]

<u>Date</u>	<u>Facts</u>
Late Dec. 1967	The Amco option was formally exercised by the corporate Defendant at the behest of Golkin; the price was \$2.00 per share; Coleman at that time was working in Chicago and was in "good financial condition" having "more than \$10,000 in cash", a sufficient sum to have invested in the option. [Uncontradicted: Tr. 49, 118; Ex. 1A-5; Ex. 4-7]
Dec. 1967	The split of the 50,000 Amco shares now owned and held by the corporate Defendant included none to Coleman; 3,750 shares at a cost of \$7,500 held for the "personal attorney" of Golkin to whom Golkin was under no "legal obligation whatsoever" to grant any shares; 3,375 shares at a cost of \$7,750 held for persons having had no present or prior stock interest in the corporate Defendant or its predecessors; Golkin personally held 18,300 shares at a cost to him of \$36,600; each investor wrote a letter reciting his interest and Golkin admitted this was for his "protection." [Uncontradicted: Tr. 107-11, 118; Ex. 4-9, 4-10, 4-12, 4-13]
Jan. 22, 1968	As had earlier been rumored, "control" of Amco Industries was indeed "transferred," in part anyway, to "Schwartzberg and members of his family." [Uncontradicted: Ex. 4-19]

<u>Date</u>	<u>Facts</u>
1968	The corporate Defendant was still filing annual tax returns. [Uncontradicted: A215]
Feb. 1971	With the approval of all the equitable owners and the SEC, the corporate Defendant at the behest of Golkin sold the 50,000 Amco shares it had purchased and held in 1967; the sale was placed through a brokerage house Golkin was working for at the time; "the big bulk of shares sold at \$18.00 per share": prompt cash distribution to the investors was made; Golkin personally made a net profit of at least \$293,000 on his shares; Coleman would have agreed to have sold with the other investors had he then 5,000 shares of Amco; if done, it would have garnered Coleman an \$80,000 net profit on the venture. [Uncontradicted: A211-14; Ex. 4-10; Tr. 48-50; Ex. 1A-9]
At no time	The whereabouts of Coleman was "general knowledge" and it could have been found out "from anywhere"; at all times Coleman had offices in downtown Chicago and was listed in its telephone directory; Coleman admittedly never took the initiative to contact anyone about the option; his testified explanation was because the option was not his to exercise and because the Nominee Agreement placed the burden of communication about the option upon the exercise holder; Coleman was under medical care for 15 months during 1969-1970 outside Illinois.

<u>Date</u>	<u>Facts</u>
	[Uncontradicted: Tr. 81-82, 89-91, 93, 94]
Spring 1971	Coleman first became aware of the option exercise and the later sale. [Uncontradicted: Tr. 44-45; A14; A40]
April 1971	This suit was filed in Chicago.
May 28, 1971	The corporate Defendant was found by the State of New York to be still "a subsisting corporation" and not dissolved under New York laws. [Uncontradicted: Ex. 4-2]

SUMMARY OF ARGUMENT

The first issue concerns the post-judgment refusal by the District Court to examine the tort theory of conversion which was presented formally and in timely fashion after judgment in this bench trial.

All the elements proving common law conversion against Saul Golkin under New York law are present and are based on facts already of record and put in without objection.

Moreover, these same uncontradicted facts prove individual corporate board member Saul Golkin's liability under §§ 719-20 of the New York Business Corporation Law ("B.C.L.").

ARGUMENT

POINT I

IT WAS ERROR FOR THE DISTRICT COURT
TO DENY A POST-JUDGMENT MOTION
SEEKING AMENDMENT OF THE PLEADINGS
TO CONFORM TO THE TRIAL EVIDENCE
AND JUDGMENT ON SAME, WHEN NO NEW
FACTS OR REOPENING OF EVIDENCE
WAS BEING SOUGHT

Under Fed. R. Civ. P. 59(a)(2) the losing party in a bench trial may move, and we did below, to "open the judgment" or to "amend conclusions of law" or to "make new findings and conclusions" or to "direct the entry of a new judgment."

Plaintiff also moved under Fed. R. Civ. P. 15(b), quoted in part as follows:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment ***.
[Emphasis added]

This second motion, jointly made with a request for a new trial, resulted from the recognition by Coleman and his counsel, perhaps imperfectly stated previously in the record, that a certain aspect of this case falls squarely within the language of Rule 15(b), to wit, the trial evidence, most of which was uncontradicted and nearly all of which went in without objection, has factually proven a legal basis for recovery under the theory of tortious conversion of property against individual Defendant Saul Golkin.

These motions were denied without explanation or opinion by the District Court.

Permit us to first discuss the wide parameters of Rule 15(b). In addition to the express liberality of the Rule itself, the courts in this Circuit have engrafted on it further construction. First of all, Rule 15(b) is not permissive in terms. The Rule says "shall," and issues raised at trial by express or implied consent (e.g., no objections to evidence) must be treated as if raised in the pleadings. E.g., SEC v. Rapp, 304 F.2d 786 (2d Cir. 1962); Cathedral Estates, Inc. v. Taft Realty Corp., 228 F.2d 85 (2d Cir. 1955). In a bench trial, as we had here, the Court has little discretion and must make findings and rulings concerning those issues. E.g., Manchester Gardens, Inc. v. Great West Life Assurance Co., 205 F.2d 872 (D.C. Cir. 1953).

It is no basis for denial of a motion under Rule 15(b) that a cause of action is changed or even that the amendment requested arises out of a different transaction or occurrence (which we, of course, do not have here). Bradford Audio Corp. v. Pious, 392 F.2d 67 (2d Cir. 1968); Wasik v. Borg, 423 F.2d 44 (2d Cir. 1970); Matarese v. Moore/McCormack Lines, Inc., 158 F.2d 631 (2d Cir. 1946); Moore v. DeGuire, 125 F.2d 486 (2d Cir. 1942); Courtland v. Walston & Co., 340 F.Supp. 1076 (S.D.N.Y. 1972); Iodice v. Calabrese, 345 F.Supp. 248 (S.D.N.Y. 1972), modified, 512 F.2d 383 (2d Cir. 1975); Wilberg Jewelry Corp. v. Palatine Insurance Co., 205 F.Supp. 696 (S.D.N.Y. 1962); Engelhard Industries, Inc. v. Sell-Rex Corp., 253 F.Supp. 832 (D.N.J. 1966), aff'd, 384 F.2d 877 (3d Cir. 1967). Indeed, there is now little doubt that the only bases upon which to deny a Rule 15(b) motion are lack of

jurisdiction over the amendment, and, secondly, a showing by defendant of prejudice in permitting the amendment. Lomartira v. American Automobile Insurance Co., 371 F.2d 550 (2d Cir. 1967); Northern Oil Co. v. Socony Mobil Oil Co., 347 F.2d 81 (2d Cir. 1965).

Applying that new law and the Rules to the joint motion below, we find that every element is present, plus some strong additional ones, to invoke these Federal Rules and grant this joint motion, e.g.:

(1) none of the evidence which would relate to the tort of conversion was objected to by defense counsel;

(2) the tort of conversion arises out of New York common law and does not bring into play any unique statutory involvement;

(3) the case was tried to the Court, and no jury need be reconvened;

(4) the Defendant cannot seriously object to the extra delay in the progress of this litigation necessarily caused by a granting of the motion; only Plaintiff Coleman has been harmed by the delay;

(5) the District Court had jurisdiction over this amendment;

(6) the motion to amend was timely under the Rule;

(7) the facts supporting this amendment clearly arise out of the same transaction or occurrence;

(8) no new parties need be added;

(9) other than modestly increased attorneys' fees, no serious prejudice could be worked upon Defendant Golkin;

(10) Plaintiff is not seeking the introduction of new or additional evidence or testimony but is prepared to stand on the present state of the record;*

(11) we pointed out to the District Court also that amending the Complaint and re-opening the judgment could be granted under Rule 15(b) "on terms" which decrease any possible prejudice to Mr. Golkin. E.g., Parissi v. Foley, 203 F.2d 454 (2d Cir. 1953); Key Pharmaceuticals, Inc. v. Lowey, 54 F.R.D. 447 (S.D.N.Y. 1972); In Shelley v. The Maccabees, 26 F.R.D. 10 (S.D.N.Y. 1960); Affron Fuel Oil, Inc. v. Firemen's Insurance Co., 143 F.Supp. 38 (S.D.N.Y. 1955). We invited Mr. Golkin to suggest any such terms he wishes to interpose but he never did.

In addition to the above list of cogent reasons to permit the amendment, Plaintiff points out that the history of this litigation is not at all devoid of references, at least collateral in nature, concerning this new cause of action: The factual allegations of the Amended Complaint [A228], on which the case was tried, would apply equally to tortious conversion. Moreover, paragraph 17 [A235] of the Amended Complaint states that Defendant Saul Golkin's activities "precluded Plaintiff from participating in said option." Paragraph 18 [A235] of the Amended Complaint continues, "Subsequent to the issuance of the stock of Amco, Golkin kept said stock in his personal possession and treated said stock as his sole property." This is unquestionably conversion language.

* If, however, Defendant Golkin wants leave to introduce more testimony, Plaintiff will not object if the absence of such additional testimony would be prejudicial to Defendant Golkin. Before the trial Court Golkin sought no such introduction.

Additionally, we point out that at pages 8 and 9 of the brief [Plaintiff's Post-Trial Memorandum, pp. 8-9] filed by Plaintiff in 1975 before judgment we summarized our general case "theory".* Coincidentally perhaps, but nonetheless actually, this synopsis of Plaintiff's position is wholly compatible and consistent with the tort of conversion, and that brief was submitted for judicial review prior to the District Court's ruling.

Finally, the discussion of factors in this case to compel permitting the new amendment includes what the Court itself did in its own opinion [A253]. Certain specific parts of that Opinion are recalled to our memory.

A. In the first place, the Court undertook to examine Mr. Golkin's conduct for its tortious aspects. The word "tortious" is used at three places in the Opinion (pages 12 through 14) [A264-66]. The Court specifically undertook to examine the question of tortious interference with contract (pages 13 through 15) [A265-67]. The importance of this last is two-fold. It not only corroborates our belief that the pleadings were broad enough to cover all torts but, perhaps more telling, this Court undertook this

* "In summary form our minimal argument amounts to this: Saul Golkin as a major officer and a key director of an undissolved New York corporation, having admitted notice of a possible interest of John Coleman in the option just before its exercise, whether he knew or should have known earlier, he had the duty to Mr. Coleman, either as a trustee or under ordinary prudence, to adequately investigate then, if not done earlier, internally within the corporation and externally with Mr. Coleman, this creditor interest. Failure to so investigate, taken together with the subsequent transfer and allocation of those assets (the stock and its sale proceeds) to himself and also to others not having a contractual right thereto, constitutes breach of his duties and falls within the statutory language of these Statutes and also the common law proscriptions." [Emphasis added]

evaluation even though our Amended Complaint and brief never specifically labeled any legal theory "tortious interference with contract."

B. Also, the Court expressly acknowledged the possibility that the case facts give rise to "the tort of conversion" in footnote number 17 [A273] to the Opinion. It even cited there three relevant New York decisions directly helpful to our factual setting (and discussed later in this brief).

We, therefore, respectfully urge that the District Court was compelled to permit our amendment to the pleadings regarding the tort of conversion. This Court can and should itself reopen and set aside the judgment, or require the District Court to do so, to address the merits of that new legal theory of tortious conversion.* We suggest, however, there is no need to remand because all the facts are before this Court now.

* Because the content of our proposed amendment is so obvious from the foregoing, we never formally filed a formal amended pleading with the District Court but invited the Court to require it. It never did.

POINT II

THE FACTS PROVE COMMON LAW CONVERSION AGAINST SAUL GOLKIN AS A MATTER OF LAW

A. General Survey

Under New York Law, the tort of conversion is clearly recognized. Its general definition is an unprivileged exercise of control over identifiable personal property of another having a superior right in same in such a way as to alter same or exclude the holder of the superior rights. E.g., Independence Discount Corp. v. Bressner, 47 App. Div. 2d 756, 365 N.Y.S.2d 44 (2d Dept. 1975); Fleck v. Perla, 40 App. Div. 2d 1069, 339 N.Y.S. 2d 246 (4th Dept. 1972).

In its application, it is clear that neither fraud nor guilty knowledge need be proven by plaintiff or even that defendant did anything wrong. E.g., Federal Insurance Co. v. Fries, 78 Misc. 2d 805, 355 N.Y.S.2d 741 (Civil Ct., N.Y. Co. 1974); Fleck, supra. Moreover, mistake is no defense. E.g., Dolitsky v. Dollar Savings Bank, 203 Misc. 262, 118 N.Y.S.2d 65 (Municipal Ct., Bronx Co. 1952).

Also, the definition of the qualifying identifiable personal property involved has been relaxed since the 19th Century and it now includes documents into which tangible items are merged and even intangible rights themselves as long as they collaterally involve a tangible item. E.g., W. Prosser, Law of Torts, §15 (1971). Securities easily qualify [e.g., Pierpoint v. Hoyt, 260 N.Y. 26, 182 N.E. 235 (1932)] as do stock options and puts and calls [e.g., Vroom v. Sage, 100 App. Div. 285, 91 N.Y.S. 456,

aff'd per curiam, 184 N.Y. 542, 76 N.E. 1111 (1905)] Prosser contends that even purely intangible property should qualify and refers to the need for involvement of some tangible property as an old "hoary limitation." W. Prosser, Law of Torts §15 (1971). The acid test is, and should be, whether the converted items "are treated by business men as property for all practical purposes." Pierpoint, supra.

Of great importance here, also, is that in New York the tort of conversion has been allowed "to pierce the corporate veil" and has been expressly held to apply to corporate officers and directors who are acting at the time on behalf of their corporations. Fleck, supra; Hinkle Iron Co. v. Kohn, 229 N.Y. 179, 128 N.E. 113 (1920). In Fleck, supra, the New York Appellate Division absolutely rejected the argument by the corporate officer-defendant "that while a corporate transferee might be liable ... an officer of that corporation is immune from personal liability, even if his actions resulted in the corporation's liability" (p. 248).

Perhaps it was the very simplicity of this legal theory that caused counsel for Plaintiff to not stress it, by name anyway, until after judgment.

We next discuss in detail three aspects of the merits of the tort of conversion raised in this case below: the element of right to possession or ownership, the statute of limitations, and the element of money damages.

B. Ownership or Right of Possession

The parties agree that there can be no conversion without a superior right in Coleman of possession or ownership. Golkin

claims that the facts show an absence of such right of possession and ownership, to which we agree in part and disagree in part. First, the area of disagreement.

Golkin argues that the rights of Coleman here were mere "equitable rights" which the tort of conversion will not protect. But this misses the point and is misleading. What conversion really will not protect are pure intangibles and real estate. Prosser, Law of Torts §15 (1971). Purely equitable rights are usually intangible; hence the maxim. What Coleman had here was not a pure intangible and was not purely equitable in nature and was not real estate.

We do not agree with part of the assertion of Golkin below concerning right in Coleman to possession. During a certain time frame, up to and after the acquisition of the stock, this right had not yet ripened. This ties in with the next two (2) sections of the brief and we will discuss it there in detail.

C. What Truly Was Converted?

For purposes of the prior discussion, and also the one below on statute of limitations, permit us now a careful examination of exactly what rights John Coleman had which were altered. The Golkin position we know is that they are purely an "equitable lien." We must look behind labels, whether found in the Golkin brief or in the pleadings, and see what property was involved.

The Coleman Nominee Agreement [A1] is the basis of this study. In simple generic terms its salient features include:

1. Golkin had the unilateral power to buy certain specific securities in a certain specific number of shares (§13).

2. If Golkin ever so purchased, 5,000 of these shares belonged to Coleman (§1, 2).

3. Once purchased, Golkin had the unilateral power to sell them, at any time (§2, 3).

4. If Golkin, after having once purchased the specific securities, were to sell them at any time "Coleman shall be entitled to the net proceeds resulting from the sale of the shares ..." [Emphasis added] (§2).

While Golkin had a duty to "consult" with Coleman (§3) and Coleman a duty to "be responsible for" the cost of the stock (§2),* these are two incidental contract duties or rights not directly relating to the eligibility of the "property" for conversion purposes or relating to the date of the conversion.

In the Golkin brief in the District Court (at page 16) [Defendant's Post-Trial Brief, p. 16] it states: "The Amco option was non-transferrable and non-assignable and therefore the plaintiff, who did not own the option, could never obtain legal ownership or possession of the stock." This seems to be absolutely true and appears to be a correct analysis of the situation through January 1971. In fact, it may even not go far enough. Mr. Coleman could not sell the acquired stock either. Moreover, he could not even prevent its sale.

But in February of 1971, all this changed. The stock was sold, including the 5,000 shares which should have been earmarked for Coleman, and a fund of money created. Under Paragraph

* We note in passing that Coleman had no duty to necessarily pay in his cost money in advance of the stock acquisition. This makes sense historically. This entire arrangement was to reward Coleman for past work.

2 of the Nominee Agreement [A1], it is expressly clear that the "net proceeds resulting from the sale of the shares" became Coleman's. The conversion occurred then! In a rapid series of events thereafter, Mr. Coleman discovered the situation, an attorney was hired, a letter was written, a disclaimer made, and this suit filed.

The earlier events in 1967 were not without relevancy to some aspects of this lawsuit, to wit, a breach by Golkin of a duty to "consult," and notice to Golkin of the possible rights of John Coleman. However, as even Golkin points out, whatever other legal rights may have been then set,* the matter was not yet "ripe" for formal dispossession.

D. Statute of Limitations

This was raised below and our basic argument on this issue is obvious. No conversion could have occurred until February 1971 when the stocks were sold and the fund of money from Mr. Coleman's 5,000 shares dispersed away. Suit was filed within 90 days thereafter.

However, it may make no difference anyway. We put forth below an alternate argument which we believe is correct.

* We feel it important to clarify this in more detail to guard against inconsistencies being ascribed to Coleman in this case. While convertible dispossession did not occur until 1971, this is not to say that no "identifiable property" existed before 1971 or that there were not "corporate obligations" by Defendants to Coleman before 1971 under B.C.L. §720(a)(1). It is all perfectly consistent. Prior to February 1971 John Coleman's rights (in a written option and later in actual securities) were clearly "identifiable property", even if he then had no immediate right to "possess" them; and furthermore the Nominee Agreement was a definite "corporate obligation" for B.C.L. §720 (a)(1) purposes as is explained later herein.

Let us imagine that this Court holds that the formal conversion took place in December 1967. If that be so, it must follow that Mr. Coleman then had an immediate right, and indeed had a duty, to demand his rights from Mr. Golkin. Failing to do that for 3-1/2 years, the Golkin attorneys argued, terminated the Coleman rights under the statute of limitations for conversion. N.Y.C.P.L.R. §214.

But this Golkin analysis, otherwise accurate once the premise is accepted, completely overlooks the following statute at C.P.L.R. §206(a)(1), which reads as follows:

§206.

(a) Where demand necessary. Except as provided in article 3 of the uniform commercial code, where a demand is necessary to entitle a person to commence an action, the time within which the action must be commenced shall be computed from the time when the right to make the demand is complete, except that

1. where a right grows out of the receipt or detention of money or property by a trustee, agent, attorney or other person acting in a fiduciary capacity, the time within which the action must be commenced shall be computed from the time when the person having the right to make the demand discovered the facts upon which the right depends;

All our elements would fit under this New York statute. The testimony was undisputed that Coleman received no notice of any of the events until 1971. There can also be no real doubt that whether or not he was a full-fledged "trustee," Golkin was nonetheless at least either an "agent" or in some "fiduciary capacity" to Mr. Coleman. The agreement [A1] here at issue, after all, is called a "Nominee" Agreement and recites that the nominee "is holding" the shares "for the benefit of Coleman." We submit that even Mr. Golkin seemed to think he had some unusual duties because he attempted but failed to have the trial Court believe that he attempted,

through a messenger, to contact Mr. Coleman in 1967 [A271-72].

Therefore, it is clear that even if the conversion did take place in December 1967, the limitation could not have begun to run until the Spring of 1971 when Mr. Coleman heard about all the history at a social gathering.

F. Damage Amount

Plaintiff is entitled to recover the cost value of the property converted at the time of the conversion (\$80,000):

It is the general rule that the proper measure of damages in an action for conversion is the value of the property, that is, the amount required to replace the goods at the time and place of the taking or conversion by the wrongdoer. *** [10 N.Y. Jurisprudence, Conversion, §70, pp. 578-79]

For the reasons set forth in the preceding section of this memorandum, it is plain that the conversion here occurred in February 1971, the time at which defendant Saul Golkin sold the Amco shares in question and did not distribute to plaintiff his \$80,000 net share of the proceeds. Again, this is because the Nominee Agreement [A1] afforded plaintiff an immediate right to possession at the time the Amco shares were sold for cash. Plaintiff was then to receive his pro-rata share of the proceeds. Thus, what was converted here was actual cash in the net amount of \$80,000. Plaintiff is, therefore, entitled to \$80,000 as damages for the conversion.

Moreover, the same measure of damages would obtain even if this Court were to find that the conversion occurred in 1967, when Defendant Saul Golkin exercised the Amco option. Under New York law, where the object of a conversion is property of fluctuating value, a plaintiff may recover the highest market value

between the date of conversion and a reasonable time after he has notice or knowledge of the conversion. 10 N.Y. Jurisprudence, Conversion, §72, pp. 583-84.

As was stated by the New York Court of Appeals in the case of Mayer v. Monzo, 221 N.Y. 442, 117 N.E. 948 (1917):

The rule is that a person whose stocks have been converted is entitled to a reasonable time after notice of the conversion within which to determine whether he will purchase other stocks in the place thereof and that he may use as a basis for his claim of damages resulting from the conversion the highest prices which have prevailed during such reasonable period. ***

221 N.Y. at 446, 117 N.E. at 950. In the case of D'Aprile v. Turner-Looker Co., 209 App. Div. 223, 204 N.Y.S. 566 (4th Dept. 1924), rev'd on other grounds, 239 N.Y. 427, 147 N.E. 15 (1925), goods were sold on May 10, 1918. Thereafter, the same goods (which remained in the custody of their seller) were sold a second time and were thereby allegedly converted by the seller on April 11, 1919. The first buyer (plaintiff) first discovered the alleged conversion about a year later. With respect to the appropriate measure of damages, the Court said:

As the whiskey was at the time in question of fluctuating value, and the plaintiff did not become aware of the re-sale until June 17, 1920, the value to be used as a basis for the plaintiff's damages is the highest market price within a reasonable time after the plaintiff became aware of the conversion within which he could determine whether he would purchase other goods in place of those which the defendant has resold. *** [Emphasis added]

209 App. Div. at 227, 204 N.Y.S. at 570. See also, the more recent case of Gelb v. Zimet Brothers, Inc., 34 Misc. 2d 401, 228 N.Y.S.2d 111 (Sup. Ct., N.Y. Co., 1962), aff'd, 18 App. Div. 2d 967, 237 N.Y.S.2d 989 (1st Dept. 1963), in which the same rule was applied in a securities context.

If this Court should somehow find in the case at bar that the conversion occurred in 1967 (rather than in 1971), the "property" converted at that time must have been either the option or the securities yielded when the option was exercised. Both options and securities are unquestionably property of fluctuating value, within the meaning of the above rule.

As the District Court noted at page 7 [A259] of its opinion, Plaintiff did not discover that the conversion had occurred until shortly after the 1971 sale, when it was ascertained at a social event. Thus, under the above rule, damages should be measured (if this Court finds that the conversion occurred in 1967) by examining the value of the converted property around the time of plaintiff's discovery. In doing so, we see that just two months before this discovery, Defendant Saul Golkin sold the Amco shares in question on the open market for a net price of \$80,000. It is, therefore, respectfully submitted that, even if the conversion did occur in 1967, damages must still be measured by the value of the Amco shares at or near the time of their sale in 1971, to wit, \$80,000 net.

G. Golkin "Intent"

Did Saul Golkin, however, have the requisite intent and qualifying frame of mind, under the tort of conversion, in what he did? Absolutely. This has been discussed earlier. Given the relaxed rules on same, all that really need be shown is that he intended to do what he did. Federal Insurance, supra; Fleck, supra; Dolitsky, supra. The District Court has said that Mr. Golkin's motive was not "to deprive Coleman of a pecuniary benefit

or to obtain such a benefit for himself," [A268], and the Court added that it was also "not predatory, malicious or against the interests of the corporation" [A267]. Such evaluation might hamper the tort of interfering with contract, but it does not destroy the tort of conversion.

Moreover, we do not have in this case an "innocent" Mr. Golkin. The trial Court described Mr. Golkin's actions as "cavalier."* [A267] They were far worse. We would like, in that connection, now to persuade the Court of our view based on uncontradicted testimony, which, we respectfully submit, was not examined closely by the District Court.

The single most pivotal fact stressed by Plaintiff throughout this entire case has been that Mr. Saul Golkin--some-
how--knew about the possible interest of Coleman before December 31, 1967 when he exercised the option, and, we respectfully submit, the District Court did not fully appreciate that subject. The trial Court dismissed the credibility of this knowledge by saying that that Court did not believe Golkin's testimony about a conversation wherein he used a certain Mr. Albert as a messenger between Golkin and Coleman. "The Court concludes that no such conversations took place." [A 271-72] But that is not all that Mr. Golkin and others said on the subject. Golkin added, and was

* We are quick to point out that was not a finding of fact, nor could it be, but was a description drawn from the uncontradicted facts. It is therefore not binding on this Court. The term means "marked by lofty disregard of others' interests, rights, or feelings." Webster's Third New International Dictionary (Unabridged, 1971).

never contradicted, that he also discussed a Coleman interest with Albert before December 31, 1967 [A197]. When we turn to the Albert testimony we find he admits to a phone conversation with Golkin in late 1967 about "exercise of the option." [Tr. 119; A97] In a word, while there was violent disagreement between Golkin on the one hand, and Messrs. Coleman and Albert on the other hand, concerning the messenger-boy role of Mr. Albert, thereby causing this Court to reject it, the testimony is not controverted on the narrower point that Golkin and Albert discussed the Coleman interest.

But what difference does it make anyway how Golkin found out about a Coleman interest in 1967? He knew somehow! Leaving aside speculation as to how factually Golkin might have been exposed to a possible Coleman interest, Plaintiff must prevail on that point under the evidence doctrine of admission-against-interest. The "bottom line" on this subject is absolutely uncontraverted that Saul Golkin, but his own sworn trial admission, was exposed to the existence of a Coleman interest in late 1967 [A197]. This Court cannot ignore that.

We have shown that under the law plaintiff in a conversion suit need not show scienter or knowledge of improper conduct. But if there is any doubt in the Court's mind about the fairness of such a rule, we have shown scienter is present here. Unlike the defendant in Federal Insurance, supra, who honestly believed the heirloom rings were his, Mr. Saul Golkin had notice of a possible Coleman interest, and, by the District Court's own finding of fact, did absolutely nothing. Activities characterized as "cavalier" certainly qualify. By dictionary definition it means

"marked by lofty disregard of others' interests, rights, or feelings." Webster's Third New International Dictionary (Unabridged, 1971).

POINT III

NEW YORK LAW (INCLUDING
B.C.L. §§717, 719, 720, AND 510)
COMPELS, AS A MATTER OF LAW, INDIVIDUAL
LIABILITY AGAINST CORPORATE DIRECTOR
SAUL GOLKIN BECAUSE OF HIS ACTIONS WITH
REGARD TO PLAINTIFF'S RIGHTS IN A
PRIOR CORPORATE OBLIGATION

A. Wording of Applicable Statutes

Section 720 of the New York Business Corporation Law states, in parts relevant here, as follows:

(a) An action may be brought against one or more directors or officers of a corporation to procure a judgment for the following relief.

(1) To compel the defendant to account for his official conduct in the following cases:

(A) The neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge.

(B) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform or other violation of his duties

(b) An action may be brought for the relief provided in this section, and in paragraph (a) of section 719 (Liability of directors in certain cases) by a corporation, or a receiver, trustee in bankruptcy, officer, director or judgment creditor thereof

(c) This section shall not affect any liability otherwise imposed by law upon any director or officer.
[Emphasis added]

Section 719 of the N.Y.B.C.L. states, in parts relevant here, as follows:

...(a) Directors of a corporation who vote for or concur in any of the following corporate actions shall be jointly and severally liable to the corporation for the benefit of its creditors or shareholders,

to the extent of any injury suffered by such persons, respectively, as a result of such action.

(1) The declaration of any dividend or other distribution to the extent that it is contrary to the provisions of paragraphs (a) and (b) of section 510

(b) A director who is present at a meeting of the board, or any committee thereof, at which action specified in paragraph (a) is taken shall be presumed to have concurred in the action unless his dissent thereto shall be entered in the minutes of the meeting, or unless he shall submit his written dissent to the person acting as the secretary of the meeting before the adjournment thereof, or shall deliver or send by registered mail such dissent to the secretary of the corporation promptly after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favor of such action. A director who is absent from a meeting of the board, or any committee thereof, at which such action is taken shall be presumed to have concurred in the action unless he shall deliver or send by registered mail his dissent there- to the secretary of the corporation or shall cause such dissent to be filed with the minutes of the proceedings of the board or committee within a reasonable time after learning of such action

(3) A director shall not be liable under this section if, in the circumstances, he discharged his duty to the corporation under section 717

(f) This section shall not affect any liability otherwise imposed by law upon any director. [Emphasis added]

In turn, Section 510 of the N.Y.B.C.L. states, in parts relevant here, as follows:

...(a) A corporation may declare and pay dividends or make other distributions in cash or its bonds or its property including the shares or bonds of other corporations, on its outstanding shares, except when currently the corporation is insolvent or would thereby be made insolvent, or when the declaration, payment or distribution would be contrary to any restrictions contained in the certificate of incorporation. [Emphasis added]

Also in turn, the relevant parts of Section 717 of the N.Y.B.C.L. provide as follows:

Directors and officers shall discharge the duties of their respective positions in good faith and with that

degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions. [Emphasis added]

B. General Statutory Construction

The statutory references under Sections 719 and 720 that a creditor-plaintiff have "judgment" status has been discussed in New York case law. In any event, the District Court gave us a judgment. But even if it had not done so, the New York courts have taken a no-nonsense approach and have virtually abandoned the judgment requirement when the creditor has a clearly matured claim, or stands in a higher status than a mere general creditor, or where it would be useless to first obtain a corporate judgment. Bonhart v. Braunwarth, -- Misc. --, 81 N.Y.S.2d 739 (Sup. Ct., N.Y. Co. 1948); Levy v. Paramount Public Corp., 149 Misc. 129, 266 N.Y.S. 271 (Sup. Ct. N.Y. Co. 1933); aff'd, 241 App. Div. 711, 269 N.Y.S. 997 (1st Dept. 1934), aff'd, 265 N.Y. 629, 193 N.E. 418 (1934); John H. Giles Dyeing Machine Co. v. Klauder-Weldon Dyeing Machine Co., 198 App. Div. 564, 190 N.Y.S. 726 (3d Dept. 1921), rev'd on other grounds, 233 N.Y. 470, 135 N.E. 854 (Ct. App. 1922); Steele v. Isman, 164 App. Div. 146, 149 N.Y.S. 488 (1st Dept. 1914).

Also, despite some confusing language in the first part of Section 719(a) ("... liable to the corporation ...") remotely suggesting that the cause of action might lie only with the corporation, such is not the case, because a few lines later in that same section, the statute speaks of "... injury suffered by such persons respectively ...," which we contend is inconsistent with such an argument and therefore controls. Moreover, Section 720(b)

expressly gives the cause of action, under both Section 719 and 720, to a "creditor." Finally, New York cases have again taken a no-nonsense approach and have historically imposed liability in suits by creditors under Section 719(a) directly against directors. E.g., Crete Concrete Corp. v. Josephs, 66 Misc.2d 837, 322 N.Y.S.2d 935 (Sup. Ct., Rockland Co. 1971), modified, 39 App. Div.2d 543, 332 N.Y.S.2d 601 (2d Dept. 1972).

As to the legal standard of duty imposed upon a director, Sections 719 and 720 of the N.Y.B.C.L. each state that the causes of action given therein are not exclusive but merely additional to "any liability otherwise imposed by law." N.Y.B.C.L. §§719(f) and 720(c). The federal courts are courts of law and of equity (Fed. R. Civ. P. §§1 and 2), and the common-law equitable concept we press that directors directly involved in the management and control of assets hold these assets by operation of law as a fiduciary, and, indeed, as a "trustee," for the benefit of creditors, is clearly found in New York cases. E.g., Chambers v. Blickle Ford Sales, Inc., 313 F.2d 252 (2d Cir. 1963); U.S. v. Spitzer, 261 F.Supp. 754 (S.D.N.Y. 1966); Matter of Baldwin Trading Corp. 8 N.Y.2d 144, 202 N.Y.S.2d 312, 168 N.E.2d 383 (1960); Boel, Inc. v. Dorf, 22 Misc.2d 798, 193 N.Y.S.2d 394 (Sup. Ct., N.Y. Co. 1959); Rosenkranz v. Doran, 264 App. Div. 335, 35 N.Y.S.2d 413 (2d Dept. 1942); Darcey v. Brooklyn & New York Ferry Co., 196 N.Y. 99, 89 N.E. 461 (1909). Such a statute is particularly strong when the director is appropriating corporation assets to himself personally. Rosenkranz, supra, at 415-6.

We submit that Section 717 of the N.Y.B.C.L. does not alter the applicable general duty standard above under the Section

719 claim herein. As pointed out therein, Section 719(f) makes that statute cumulative and not exclusive. Also, Section 717 does not on its face deny the status of trustee to a director dissipating corporate assets to the detriment of creditors. The language of 717 charges a director with the duty of due care which men would exercise "under similar circumstances in like positions." We contend that in interpreting those six (6) words in this situation, the general rule guides. In other words, we feel that the standard this Court ought to apply under a Section 719 claim is one of the ordinary due care of a trustee. The statute and the common law rule are totally compatible.

However, we feel secure that even if only a standard of negligence applies to the conduct of Mr. Golkin under Section 719, it is more than fulfilled, and, in fact, a sloppy recklessness is apparent.

C. Argument Summary

In summary form our minimal argument amounts to this: Saul Golkin as a major officer and a key director of an undis-solved New York corporation, having admitted notice of a possible interest of John Coleman in the option just before its exercise, whether he knew or should have known earlier, he had the duty to Mr. Coleman, either as a trustee or under ordinary prudence, to adequately investigate, internally within the corporation and externally with Mr. Coleman, this creditor interest. Failure to so investigate, taken together with the subsequent transfer and allocation of those assets to himself and also to others not having a contractual right thereto, constitutes breach of his duties and

falls within the statutory language of these statutes and also the common law proscriptions.

The above position, we submit, is sufficient without ever reaching other issues, such as whether or not Mr. Golkin actually knew about, or should have known about, or had notice of, Mr. Coleman's rights earlier, as we claim herein he did.

It is manifestly important regarding this "duty to investigate" that the District Court found as a finding of fact that there was no investigation [A271-72] after having somehow obtained notice of a possible Coleman interest.

D. Argument Details

B.C.L. §719(a)(1) imposes liability as follows:

(a) Directors of a corporation who vote for or concur in any of the following corporate actions shall be jointly and severally liable to the corporation for the benefit of its creditors or shareholders, to the extent of any injury suffered by such persons, respectively, as a result of such action:

(1) The declaration of any dividend or other distribution to the extent that it is contrary to the provisions of paragraphs (a) and (b) of section 510 (Dividends or other distributions in cash or property).
[Emphasis added]

Section 510(a), incorporated by reference into §719(a)

(1), provides:

(a) A corporation may declare and pay dividends or make other distributions in cash or its bonds or its property, including the shares or bonds of other corporations, on its outstanding shares, except when currently the corporation is insolvent or would thereby be made insolvent, or when the declaration, payment or distribution would be contrary to any restrictions contained in the certificate of corporation. [Emphasis added]

In the instant case the Gellman option was conferred upon and existed as the property of the corporate Defendant

(subject, of course, to Coleman's interest). In 1962 Mr. Golkin "probably glanced" at that portion of this agreement to buy into the corporate Defendant which refers generally "to those warrants and options held for employees not presently Shareholders" and he also knew about the Gellman option at that time. One must ask why did not he ask some questions at that time? In 1967 he knew of the Coleman interest, yet he never tried to contact him (by District Court finding of fact) at any time. The 1971 sale proceeds were distributed to the individual Saul Golkin, a director and the largest and controlling shareholder and to certain relatives and affiliates of Saul Golkin. At the time of the distribution, the Gellman option was the only significant asset of the corporation. Distribution of the option meant that the Company was thereafter unable to satisfy its obligations to John Coleman.

As stated in 2 White on New York Corporations, ¶510.01, p. 5-205 (13th ed. 1974):

... The purpose of this new provision is to afford additional protection for creditors, particularly in view of the current widespread practice of using low par or no par shares to create large surpluses available for dividends

A creditor successfully sued a director under this combination of B.C.L. §§719(a)(1) and 510(a) in Crete Concrete Corp. v. Josephs, 66 Misc.2d 837, 322 N.Y.S.2d 935 (Sup. Ct., Rockland Co. 1971), modified, 39 App. Div.2d 543, 332 N.Y.S.2d 601 (2d Dept. 1972). That court imposed liability on a director who, the Court found, rendered two debtor corporations insolvent at a time when the plaintiff was performing work which would probably place it in a creditor status.

There is no question that Saul Golkin concurred in the corporate action in question, since he was the very person who distributed participations in the option.

In assessing liability the Court should hold Saul Golkin to a standard no lower than negligence. This is because B.C.L. §719(e) provides:

(e) A director shall not be liable under this section if, in the circumstances, he discharges his duty to the corporation under Section 717 (Duty of Directors and officers).

Section 717, in turn, provides in material part:

Directors and officers shall discharge the duties of their respective positions in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions

The District Court described in passing the Golkin actions with respect to the Gellman option as being "cavalier." [A267] We noted earlier in this brief that his actions were far worse, but even "cavalier"* actions toward the Plaintiff by the major shareholder, chief executive officer, and director fall short of ordinary prudence, the test established by B.C.L. §717.

Defendant Golkin, a director, effected a distribution of the assets of the corporation which thereby rendered that corporation insolvent and unable to meet its obligations to plaintiff, a creditor. Under the facts, he acted, as a matter of law, not like a man of ordinary prudence. Therefore, under B.C.L. §§719 (a)(1), 510(a), and 717, Plaintiff may recover his consequent loss from Defendant Golkin individually.

* The term means "marked by lofty disregard of others' interests, rights, or feelings." Webster's Third New International Dictionary (Unabridged, 1971).

In the District Court we argued in the alternative that liability should fall on individual defendant Golkin under B.C.L. §720(a)(1), which provides:

(a) An action may be brought against one or more directors or officers of a corporation to procure a judgment for the following relief:

(1) To compel the defendant to account for his official conduct in the following cases:

(a) The neglect of, or failure to perform or other violation of his duties in the management and distribution of corporate assets committed to his charge.

(b) The acquisition by himself, transfer to others, loss of waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties. [Emphasis added]

Saul Golkin's "cavalier" failure to perform his duty under the corporation's nominee agreement with John Coleman resulted in an improper distribution of the proceeds from the Gellman option. Furthermore, Saul Golkin's failure resulted in acquisition of part of the option by himself and resulted in the transfer of part of the option to others, including his relatives and affiliates.

This Court of Appeals in Rapoport v. Schneider, 29 N.Y. 2d 396, 278 N.E.2d 642, 328 N.Y.S.2d 431 (1972), in allowing an action to prevent an allegedly improper payment of a duplicate claim and to obtain an accounting, stated, 29 N.Y.2d at 400, 278 N.E.2d at 645, 328 N.Y.S.2d at 435 (per Judge Breitel):

*** The statute is broad and covers every form of waste of assets and violation of duty whether as a result of intention, negligence, or predatory acquisition. ***

See also, Conant v. Schnell, 33 App. Div.2d 326, 307 N.Y.S.2d 902 (3d Dept. 1970).

Indeed, the District Court commented with respect to B.C.L. §720(a)(1) and its predecessors:

*** They serve to prevent the directors of a corporation from divesting it of all of its assets without first affording a reasonable opportunity to its creditors to present and enforce their claims. ***

[A264]

E. District Court Ruling

Judge Cannella never addressed any of the above presentations by Plaintiff. Instead he focused on only one factor in the equation. Judge Cannella was of the view that the Coleman claim did not "accrue prior to the allegedly improper transfer." That was the only basis for his ruling on the entire statutory issue. He never discussed any other aspect.

F. Plaintiff DID Have a Prior Obligation

The Honorable District Court, however, declined to award Plaintiff relief under these statutes for the reason that it seemed to the District Court that the corporation's obligation to Plaintiff arose for B.C.L. §720(a)(1) purposes only at the moment it made the wrongful distribution and that plaintiff did not have an already existing obligation at the time of the distribution. The trial Court stated:

*** Sections 60 and 61 of the General Business Law and their successor, Section 720 of the Business Corporation Law, have as their specific purpose the protection of creditors with claims that have accrued prior to the allegedly improper transfer. *** The situation before the Court is not one in which it is alleged that a corporate officer or director interfered with a creditor's ability to reach corporate assets to enforce a pre-existing obligation of the corporation. ***

[A263-64]

It is respectfully submitted, however, that there can be no dispute that this is a case, in fact, involving interference with a creditor's ability to enforce a pre-existing obligation.

The Nominee Agreement [A1] states that 1962 (or 1963) "obligations" of the corporation to plaintiff:

1. Divine & Fishman agrees, with respect to the foregoing option to purchase 50,000 Common Shares of Gellman Manufacturing Company, that it is holding 10% of said option or the right to purchase 5,000 Common Shares as nominee for the benefit of Coleman.

2. Divine & Fishman agrees that in the event it *** elects to exercise part or all of said option, *** Coleman shall be the beneficial owner of 10% of the shares acquired on the exercise of said option and he shall be entitled to receive all dividends paid on said shares beneficially owned by him, provided, however, Divine & Fishman shall remain the record holder of said shares so acquired. In the event any or all of said shares so acquired on the exercise of the option are sold, Coleman shall be entitled to the net proceeds resulting from the sale of the shares beneficially owned by him.

3. Divine & Fishman agrees that it shall consult with Coleman with respect to the exercise or sale of the option or any shares acquired thereunder. ***

We see that the corporate obligations to Plaintiff include:

(a) As of 1962, an obligation to hold 10% of the Gellman option for the benefit of plaintiff.

(b) As of 1962, an obligation to consult with plaintiff concerning actions taken with respect to the Gellman option.

(c) As of late December, 1967, the time at which the Gellman option was exercised, an obligation to hold 10% of the Amco shares so acquired for the benefit of plaintiff.

(d) As of some date in February, 1971, the date on which the Amco shares so acquired were sold, an obligation to pay

immediately to plaintiff 10% of the fund of monetary proceeds received from said sale.

The wrongful distribution of the proceeds of the sale, in disregard of these pre-existing "obligations" to plaintiff, occurred soon thereafter.

Indeed, in the present case the corporation's "obligations" to plaintiff were far more firmly established at the time of wrongful distribution than in the case of Crete Concrete Corp. v. Josephs, supra, in which the Court found that at the time of wrongful distribution plaintiff was "a creditor or *** was performing work which would plainly place it in a creditor status." 66 Misc.2d at 841, 322 N.Y.S.2d at 939.

It is respectfully submitted that in the present case the various "obligations" (in contrast to "right to possession") owed by the corporation to Plaintiff over a span of nearly nine years cannot be lumped together into the wrongful distribution of the proceeds as a single event, as the District Court did. Rather, the corporation's "obligations" to Plaintiff were in fact pre-existing at the time individual Defendant Golkin effected the wrongful distribution of the corporation's assets. Plaintiff should therefore recover his consequential loss from Defendant Golkin pursuant to B.C.L. §720(a)(1).

We have discussed that it is not necessary for Plaintiff to have been a judgment creditor of the corporation before proceeding against Defendant Golkin. It has been held that where it appears that prosecution of a claim to judgment would avail the creditor nothing, no such useless effort is required. Bonhart v. Braunwarth, -- Misc. --, 81 N.Y.S.2d 739, 740 (Sup. Ct., N.Y. Co.

1948); Levy v. Paramount Public Corp., supra; John H. Giles Dyeing Machine Co. v. Klauder-Weldon Dyeing Machine Co., 198 App. Div., 564, 573-74, 190 N.Y.S. 726, 732-33 (3d Dept. 1921), rev'd on other grounds, 233 N.Y. 470, 135 N.E. 854 (Ct. of App. 1922); Lilienthal v. Betz, 108 App. Div. 222, 223, 95 N.Y.S. 849, 850 (1st Dept. 1905), rev'd on other grounds, 185 N.Y. 153, 77 N.E. 1002 (Ct. of App. 1906). See also, Eskimo Pie Corp. v. Whitelawn Dairies, Inc., 266 F.Supp. 79, 82 (S.D.N.Y. 1967).

Alternatively, plaintiff now has a judgment against the corporation, and it cannot be satisfied.

CONCLUSION

The Plaintiff-Appellant seeks from this Court an outright reversal in respect to the denial of his motion to require a ruling on the conversion theory against Saul Golkin.

Thereafter, we seek a judgment from this Court on the conversion issue and an outright reversal of the judgment in favor of the director and officer Saul Golkin on the statutory liability.

We submit there is no need at all for a remand because all the facts that are required to rule on all aspects of this appeal are already of record.

Dated: New York, New York
February 14, 1977.

Respectfully submitted,

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